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IN THE

Supreme Court of the United States

October Term, 1962.

No. 448

HERMAN KRAVITZ,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

HERMAN KRAVITZ, your Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on June 1, 1962.

OPINION BELOW.

The Opinion of the court below (Appendix A, *infra*, p. 19) is reported in 303 F. 2d 700. The opinion of the District Court is unreported (R. 9a).

JURISDICTION.

The judgment of the court below (Appendix B, *infra*, p. 24) was entered on June 1, 1962. A timely petition for rehearing was denied (Appendix B, *infra*, p. 25) on June 26, 1962. The jurisdiction of this court is invoked under 28 U. S. C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED.

The Fifth Amendment to the United States Constitution provides, *inter alia:*

> "No person . . . shall . . . be deprived of life, liberty or property, without due process of law. . . ."

28 U. S. C. Sec. 2255 provides, *inter alia:*

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> "A motion for such relief may be made at any time.
>
> "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall

discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

* * *"

QUESTIONS PRESENTED.

1. Was petitioner deprived of due process of law, the opportunity to have a fair trial guaranteed to him by the Fifth Amendment, by the District Court's denial, without a hearing, of petitioner's motion under 28 U. S. C. Sec. 2255, where the petition, *inter alia*, set forth, without any answer or denial by the Government, that the prosecutor misled the court and the jury as to a material fact affecting the credibility of the key government witness?

2. Where, before trial, the trial judge had read a presentence investigation report which contained statements attributed to and about petitioner and which accused him of other crimes, but as to which petitioner was not informed nor given an opportunity to refute, and where this report was relied upon in sentencing petitioner, was petitioner deprived of due process of law, guaranteed by the Fifth Amendment, by the order of the same District Court, denying without hearing his petition under 28 U. S. C. Sec. 2255, which petition was not answered or denied by the Government and which alleged the falsity of the contents of the presentence report?

STATEMENT OF THE CASE.

This is a petition to review the order of the Court of Appeals, affirming the order of the District Court, denying without a hearing his petition under 28 U. S. C. Sec. 2255.

On March 13, 1958, petitioner had been indicted, with his father, Samuel Kravitz, and one Joseph Abrams, for conspiring and attempting to evade income taxes for the year 1951. On July 3, 1958, petitioner withdrew his pleas of not guilty previously entered on June 20, 1958, and entered pleas of guilty. Before petitioner was scheduled for sentencing on October 16, 1959, after a hearing, petitioner was permitted to withdraw his guilty pleas and to re-enter his pleas of not guilty.

Although there had been pending since August 27, 1958, a motion by Abrams to transfer to the United States District Court for the Eastern District of New York, the Government obtained an order consolidating for trial all indictments against petitioner, Abrams and Samuel Kravitz. On January 25, 1960, the Government moved for trial against petitioner and Samuel Kravitz but not Abrams. The Government also moved for severance as to Abrams, and presented to the district court a stipulation executed by the prosecutor and counsel for Abrams agreeing to the severance, which the district court then and there granted.

On February 10, 1960, petitioner and Samuel Kravitz were found guilty on all indictments by a jury. Thereafter, on March 4, 1960, timely motions for new trial or judgment of acquittal were denied by the district court. Petitioner was sentenced to a total of ten years' imprisonment, i.e. five years on each indictment, two of the sentences of imprisonment to be concurrent, one consecutive, and total fine of $30,000.

On August 12, 1960, the Court of Appeals for the Third Circuit affirmed the conviction of petitioner and directed the acquittal of Samuel Kravitz (281 F. 2d 581). On January 16, 1961, a petition for a writ of certiorari was denied by the United States Supreme Court (364 U. S. 941).

At the trial the Government produced co-defendant Abrams to testify as the chief witness against petitioner. In his opening address to the jury, the prosecutor stated that the defendant, Joseph Abrams, "is not going to trial at this time in this district." As admitted by the Government's appellate counsel at the argument of the appeal herein before the Court of Appeals, that statement misled the court and jury to believe that Joseph Abrams would stand trial on those charges. In fact, the trial prosecutor then knew that he had been authorized *and instructed* by a letter from the Department of Justice dated November 20, 1959, to move for the dismissal of the charges against Abrams. Neither petitioner nor his counsel knew of the letter at that time. On the authority of that letter, the prosecutor did subsequently move to dismiss the indictments in the district court of New Jersey pending against Abrams and they were dismissed on April 20, 1960. Not until after the argument in the United States Court of Appeals for the Third Circuit on the appeal from the conviction in July, 1960, did counsel for petitioner first learn that the indictments against Abrams had been dismissed. Counsel did not know the contents of the letter even at that time, and did not learn them until the argument of the instant appeal before the Court of Appeals for the Third Circuit on March 9, 1962. During that argument, the Government's then appellate counsel, Richard A. Levin, Assistant United States Attorney, Newark, New Jersey, read to the Court of Appeals the letter which had been in the possession of the Government's trial counsel since on or about November 20, 1959.

The testimony of Joseph Abrams against petitioner was critical, particularly since it was the only evidence adduced by the Government in its attempt to show, relative to the indictment against petitioner charging evasion of his personal income tax, that the petitioner had received any of the money alleged to have been siphoned from Kravin Park.

The critical issue of fact was whether Abrams or petitioner had received all of such money. Accordingly, the credibility of Abrams was the decisive factor. The failure of the prosecutor to state the true facts as to the future of the prosecution of Abrams operated to conceal from petitioner, from the court and from the jury vital information bearing upon the motive and credibility of Abrams. Even in the course of trial, the prosecutor remained silent and permitted the jury to continue to believe that after the trial the Government would prosecute Abrams on the indictments wherein he was a co-defendant with petitioner.

The said Abrams was offered as a witness by the Government and testified against the petitioner, although he was a co-defendant with him and had previously been indicted and was serving sentence as follows:

(1) Indictments Nos. C144-185 and C144-188, filed on or about June 1, 1954, in the United States District Court for the Southern District of New York charging Abrams inter alia with theft of government property in violation of 18 U. S. C. Sec. 641 and conspiracy to defraud the United States. He was convicted by a jury and received a sentence of thirty months imprisonment on June 4, 1957 (*United States v. Fabric Garment Co., Inc.*, 262 F. 2d 631) (2nd Cir. 1958). Abrams commenced service of this sentence on July 31, 1959. Abrams was the ringleader in the illegal enterprise covered by the indictments.

(2) Indictment C156-161, filed July 9, 1958, in the United States District Court for the Southern District of New York, charged Abrams in four counts with substantive attempts to evade income taxes of certain corporations in violation of 26 U. S. C. Section 145(b) and preparation and filing false tax returns, and one count of conspiracy. Abrams pleaded guilty to Count 2, which charged attempted evasion, and Count 4, which charged preparation and filing. This indictment was

transferred to the United States District Court for the Eastern District of New York as to Abrams. He was sentenced on November 13, 1959, to pay a fine of $10,000. and to one year imprisonment, execution of which was suspended and he was placed on probation for one year commencing his release from confinement on a sentence then being served. Conditions of the probation were that he pay the entire tax obligation due under Count 3 of Indictment No. 45366 and that he cooperate with the Government in the income tax case against petitioner in the District of New Jersey.

(3) Indictment No. 45366, filed March 13, 1958, in the United States District Court for the Eastern District of New York, which charged Abrams with attempted evasion of personal income taxes in violation of 26 U. S. C. Section 145(b) in Count 3, for the year 1951 ($254,473.23), and in Count 4, for the year 1952 ($37,447.16). Abrams pleaded guilty to Count 4, and was sentenced on November 13, 1959, to pay a fine of $10,000. and to a term of two years' imprisonment to run concurrently with a sentence then being served under Indictment C144-188.

In addition, the said Abrams was then under investigations which resulted in an indictment against him in the United States District Court for the Southern District of New York charging him with violations and conspiracy to violate the laws of the United States relating to securities transactions in Counts 1 and 2 (15 U. S. C. Sections 77q(a), 78i(a)(2); and 78ff(a)), Counts 4-35 (15 U. S. C. Section 77e(a)(1)), committed within a period prior to the trial of the petitioner herein.

In addition, the said Abrams was then under investigations which resulted in an indictment against him in the United States District Court for the District of Columbia, being Indictment No. 43-61, filed January 18, 1961, charging Abrams with violation of 18 U. S. C. Section 371, to wit,

conspiracy to defraud the United States through the corruption of an employee of the Securities and Exchange Commission committed within a period prior to the trial of the petitioner herein. In February, 1962, Abrams along with John G. Ledes, former S. E. C. official, and Charles Gordon were convicted of conspiring to defraud the Government. Petitioner Herman Kravitz testified at that trial on behalf of the Government. (Washington Post, Friday, February 2, 1962, page 3, column 3.)

In addition, the said Abrams was then under investigation which resulted in an indictment against him in the United States District Court for the Southern District of New York, being Indictment No. 61-332, charging him in 104 Counts with violations of 15 U. S. C. Sections 77e(a)(1), (2), and 77x, and with violations of 18 U. S. C. Section 371, committed within a period prior to the trial of the petitioner herein.

The Government, at the time it offered the said Abrams as a witness against the petitioner, knew of the aforementioned investigations, and was fully informed as to his faithlessness and unreliability, including the fact that he would not hesitate to commit wrongs for his own purposes, but the Government concealed the said information from the Court and the petitioner.

All of the above facts were set forth in the petition filed with the District Court under 28 U. S. C. Sec. 2255, with the exception that Abrams' conviction in the District of Columbia did not occur until after the decision of the District Court and was brought to the attention of the Court of Appeals through a reference in the Appellant's Reply Brief; and with the further exception that, as already noted, counsel for petitioner did not know the contents of the letter from the Department of Justice, dated November 20, 1959, until it was read to the Court of Appeals by the Government's appellate counsel on March 9, 1962. This was brought into the record by Certificate of Counsel filed as

part of the petition for rehearing in the court below. (Petition for Rehearing, p. 5.)

Prior to the time of the trial of the petitioner, as a result of the plea of guilty which had previously been entered by petitioner and which was subsequently withdrawn, the trial judge had before him and had read a presentence investigation report. Although during the hearing on the motion for withdrawal of the guilty pleas the District Judge had mentioned the presentence report, petitioner and his counsel have never been informed of the actual contents of that report. However, the Memorandum filed by the district court on March 27, 1961, in denying petitioner's application for reduction of his sentence, made several references to the contents of that report. *Then for the first time*, petitioner and his counsel became aware that the report contained false and prejudicial material with respect to statements attributed to petitioner and statements of others about him and assertions of bribery directed against him. In the petition filed herein under 28 U. S. C. Sec. 2255, these facts were set forth and petitioner alleged that all of the statements disclosed by the district judge were unfounded and untrue. Nonetheless, the district court held that the records of the case showed petitioner not to be entitled to relief and denied the petition without a hearing. The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT.

This case presents two important issues which not only affect the basic rights of the individual petitioner to due process of law in trial and sentencing, but also vitally affect the administration of criminal justice in the federal courts. The first of these concerns the duty owed by the federal prosecutor not to mislead the court and jury in the presentation of the prosecution. The second brings into question the fairness of a procedure by which a defendant in a criminal action is deprived of a fair and impartial arbiter, by the

receipt by the trial judge of false and prejudicial statements from faceless informers without the right to answer those charges.

1. The allegations of the petition filed below were not denied by the Government and, therefore, stand admitted. This is especially emphasized by the facts *first* disclosed to petitioner's counsel and the courts at the argument before the Court of Appeals concerning the nature of the directive from the Department of Justice to the prosecutor. The directive could not have been discovered from the record, but only if a hearing had been granted. In similar circumstances, the Courts of Appeals have previously held that a hearing is necessary. *United States v. Derosier*, 229 F. 2d 599 (3d Cir. 1956); *United States v. Stevens*, 224 F. 2d 866, 869; cf. *Clark v. Warden, Maryland Penitentiary*, 293 F. 2d 479 (4th Cir. 1961) and cases cited therein. Also see *Machibrodo v. United States*, 368 U. S. 487 (1962).

In this respect, a petition under Title 28, U. S. C. Section 2255, is analogous to an application for a writ of habeas corpus. In determining whether it must issue a writ which will bring the petitioner before it or whether it may dismiss the petition as not affording grounds for habeas corpus relief, the court must take all allegations in the petition as true, except to the extent that, in the judgment of the court, they conflict with the records before it. *Walker v. Johnston*, 312 U. S. 275 (1941); *United States ex rel. Master v. Baldi*, 198 F. 2d 113 (3d Cir. 1952).

The gravamen of petitioner's complaint is that the prosecution misled the court and the jury. The jury was told by the prosecutor at petitioner's trial, that Abrams "is not going to trial at the time in this district". The truth is that the prosecutor was not merely authorized *but instructed* by the Department of Justice as early as November 20, 1959, to dismiss the charges against Abrams. The charges were in fact dismissed, after petitioner's trial, on April 20, 1959.

The petition spells out the critical area of the trial against petitioner: the credibility of Abrams. In addition

to his misleading the court and jury, and his omission to declare the true situation with respect to Abrams, the prosecutor advanced Abrams as a witness despite the fact that the Government certainly was aware of the long list of grave charges against Abrams, set forth in the petition, thereby vouchsafing his credibility as a government witness when his faithlessness and unreliability and his willingness to commit wrongs, including perjury, for his own benefit were evident to the Government.

The prosecuting attorney was under a duty, of course, not to mislead the jury, and he was under a duty to disclose the true facts. Without this information, the jury could not properly perform its duty to evaluate the credibility of the accomplice witness. *People v. Mangi*, 10 N. Y. 2d 86, 176 N. E. 2d 86 (1961). The obligations of a prosecuting attorney admit of no contrary performance. Cf. *Berger v. United States*, 295 U. S. 78 (1955); and see *Alcorta v. Texas*, 355 U. S. 28 (1957), basing its conclusion on constitutional due process. Also see *Rutkin v. United States*, 212 F. 2d 641 (3d Cir. 1954).

The courts below misapprehended the impact of the allegation concerning the prosecutor's misstatement. The district court, in its Memorandum Opinion dismissing without a hearing the petition under Sec. 2255, omitted any reference to the decisive character of the prosecutor's default in his obligations. The district court was satisfied to assert that Abrams had been and was subject to criminal and civil *tax* problems. It stressed, by quotation from the record of the trial, that the issue of Abrams' credibility had been left to the jury. Neither the court nor petitioner could know, however, the extent to which Abrams was actually subject to criminal prosecution, but the Government knew—and it knew that Abrams' difficulties were not limited to "criminal and civil tax problems". Nevertheless, the Memorandum Opinion by the district court proves the harm caused by the failure of the prosecutor to be candid. Obviously, the jury had been misled by the court's

instruction that "Abrams still has criminal and civil tax problems to face in the future"; *since the prosecutor well knew at that time that Abrams did not have facing him* the criminal tax problems in the future, as indicated by the trial record. The directive from the Department of Justice ordering the dismissal of the criminal charges was *then* in his file.

The prosecutor owed a duty to the courts, as well as to petitioner, not to mislead the court and jury about the true facts. Cf. *Napue v. Illinois*, 360 U. S. 274 (1959). It is further noted that had a hearing been held on this petition, petitioner and the courts would have learned the true state of mind and knowledge of Abrams surrounding this dismissal.

The Court of Appeals concluded that the facts justifying an unfavorable inference against Abrams were disclosed to the jury.[1] The court noted that the jury must have learned from Abrams' own testimony that he had something to gain by testifying against Kravitz. But counsel for petitioner and the jury did not and could not know to what extent this was true. The prosecutor had not only obtained a severance but had also stated to the jury in his opening speech that Abrams "is not going to trial at *this* time in *this* district" (emphasis supplied) on this indictment. And the jury would more likely accept the prosecutor's, rather than Abrams', word. The effect of the prosecutor's statement was that Abrams was going to trial on this indictment.

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1. The Court below stated in its opinion:

"The entire record considered, we think the jury was given a fair picture of the type of person Abrams was and of his interest in winning the favor of the prosecution. Certainly, there was nothing in the prosecution's presentation or use of this witness *to make it intolerable* that this conviction stand." (Emphasis supplied.) (Appendix A, *infra*, p. 23)

But counsel for petitioner as well as the jury did not know that Abrams had already won the "favor" of the prosecution not that it was merely "contemplated" as the court below viewed it.

The trial prosecutor further compounded the misimpression he had created: he stated to the Court of Appeals for the Third Circuit in his Answer to the Petition for Rehearing on the appeal from the convictions:

> "The grant of permission to dismiss the charges does not constitute a mandatory directive to that official". (Page 2).

But the Attorney General ". . . . shall have supervision over all litigation to which the United States . . . is a party and shall direct all United States Attorneys, Assistant United States Attorneys . . . ." 28 U. S. C. Sec. 507(b). *And even at this stage there was concealment of the contents of the directive by the Department of Justice.*

Government appellate counsel in the instant proceedings upon being asked by the court below read the letter which in clear terms *directed* the prosecutor to move for that dismissal, although previously in the Brief and Appendix for Appellee filed by the prosecutor he had stated to the Court of Appeals:

> "The entire history of the proceedings against Abrams, both before and after appellant's trial, was a matter of public record". (Page 6)

Obviously the letter read to that Court by the prosecutor's successor was not a public record and could not have been raised in the brief on appeal. Furthermore, while it is true that the proceedings relating to the dismissal were a matter of public record in the sense that the record was not impounded, it is fact that the motion to dismiss was heard on April 20, 1960, after the petitioner's trial and sentence, on a day which was not a regular motion day and when no other matters were heard in court at that session; there was nothing in any newspaper in Philadelphia, Camden or Atlantic City before or after the proceeding which might have brought this to the petitioner's attention; petitioner and his counsel were not notified and, as a matter

of fact, did not learn of the dismissal until the time alleged in the petition. But most important, there was no way for petitioner or his counsel to learn that the dismissal had been directed by the Department of Justice on November 20, 1959, before petitioner's trial, since the only reference to an authorization appears in the Order for Dismissal of the indictment against Abrams dated April 20, 1960;[2] and the only way that counsel learned that the authorization amounted to a direction was when Government appellate counsel read the letter to the Court of Appeals upon being asked by the Court what were the instructions to the trial prosecutor by the Department of Justice.

The jury was entitled to know the true facts, and the prosecutor owed a duty not to conceal and misrepresent. The allegation in the Sec. 2255 petition thus set forth a valid ground for relief, and the court was under a duty at least to hold a hearing to determine the relevant facts. See *Mitchell v. United States*, 368 U. S. 439 (1962). On the basis of the Government appellate counsel's admission to the Court of Appeals concerning the contents of the letter from the Department of Justice, in addition to the other allegations of the petition, there should be here at the very least a hearing.

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2. The Order, entered in the proceedings against Abrams, Criminal Numbers 116-58 and 117-58, reads as follows:

"Order for Dismissal.

Pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure and by leave of Court endorsed hereon the United States Attorney for the District of New Jersey hereby dismissed the indictment filed March 13, 1958 against JOSEPH ABRAMS, defendant for the reason that the defendant is presently serving a sentence for evasion of his personal and corporate income taxes and permission having been granted by the Department of Justice by letter dated November 20, 1959.

Chester A. Weidenburner,
U. S. Attorney

Leave of Court is granted for the filing of the foregoing dismissal.

Thomas M. Madden,
Date: April 20, 1960. United States District Judge"

2. The petition further alleges that prior to petitioner's trial the District Court had read a presentence investigation report. It further alleges that the report contained prejudicial material with respect to statements attributed to petitioner and of others about him and assertions of bribery against him, all of which are alleged to be unfounded and untrue. Admittedly these influenced the District Court in determining sentence, and undoubtedly affected the District Court in its conduct of the trial; and the imposition of sentence. Yet petitioner was not informed of the nature of the accusations, was not confronted with witnesses, and was given no opportunity to answer or defend against the assertions.

The answer of the district court to the allegations, in denying the petition without hearing, was that petitioner did not apply to disqualify the trial judge and cites the opinion of the Court of Appeals for the Third Circuit in affirming the convictions that "on the whole, the trial judge made a fair presentation to the jury". The Court of Appeals, in affirming the district court's order, likewise noted that "no request was made that the judge disqualify himself or assign the trial to a colleague".

But petitioner could not have moved to disqualify the district judge when he was unaware of the disqualifying factor. It was not until the district judge filed his Memorandum Opinion denying petitioner's application to modify his sentence that petitioner learned the contents of that report.

The issue is not whether "on the whole" the trial judge made a fair presentation to the jury, but whether petitioner had a trial moderated by an impartial arbiter. Had the district court not been exposed to the admittedly prejudicial and allegedly false report, it could have reacted in a myriad of different ways which could have affected the result of the case. For example, it might not have charged the jury as it did—that in the main it believed the testimony of

Abrams, the prosecution witness, and did not believe all of the grand jury testimony of petitioner which was *read* into the trial record.

It is not contended that the mere fact that a judge knows something to the discredit of an individual disqualifies him from presiding over a trial of that individual. It is rather suggested that if the judge were exposed to false and malicious information which might have prejudiced him, then defendant was deprived of an impartial arbiter and a fair trial. See *McFadden v. United States*, 63 F. 2d 111 (7th Cir. 1933). Furthermore, it is contended that petitioner was certainly deprived of a fair sentencing procedure. In *Townsend v. Burke*, 334 U. S. 736 (1948), this Court held that there must be due process in the sentencing procedure. In that case a sentence entered on a guilty plea was vacated because the sentencing judge had misread the defendant's record, and defendant was unable to correct this because he lacked counsel. It is a futile and frustrating doctrine which holds that due process requires defendant to have counsel at sentencing, but which also holds that counsel is not permitted to bring to the court's attention and to offer evidence to contradict any false information about defendant which the court has and uses.

It must be noted that the matters dealt with in the presentence report were not merely facts such as are objectively observed and verified by proof (e.g., reports about his education, military training, past record, religious and community activities, etc.); they were *opinions and rumors* by faceless, nameless informants. In his petition the petitioner positively asserted that they are false and asked an opportunity to prove their falsity. Nonetheless, he was denied a hearing.

In *Smith v. United States*, 223 F. 2d 750 (5th Cir. 1955), the court stated:

> "Rule 32(c)(1) of the Federal Rules of Criminal Procedure, 18 U. S. C. A., provides that the probation service's report of the presentence investigation 'shall

not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty'. Whenever it is at all practicable to observe such safeguards, we agree with what was said by the Sixth Circuit sitting en banc in *Stephan v. United States*, 133 F. 2d 87, 100:

> "'We think, however, that such information should have been disclosed to the Judge in open court and in the presence of appellant. Such appears to have been the practice in the cases cited. We think that the interest of convicted persons about to be sentenced is more carefully safeguarded by open hearings under such rules as the court may adopt.'
>
> "Further, a convicted offender is not completely beyond the pale of constitutional protection. A sentence imposed by a state court had been held lacking in due process where the defendant was not represented by counsel and the sentence was imposed by the trial judge under the mistaken belief that the defendant was guilty of other crimes. *Townsend v. Burk*, 334 U. S. 736. . . ."

These remarks are particularly applicable here where the sentence, ten years imprisonment, was the harshest ever meted out by this district court in an income tax case. The decision in this case squarely conflicts with the above decisions.

CONCLUSION.

For the reasons stated this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,774.

UNITED STATES OF AMERICA,
Appellee,

v.

HERMAN KRAVITZ,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Argued March 8, 1962.

Before: KALODNER, STALEY and HASTIE, *Circuit Judges.*

OPINION OF THE COURT.

(Filed June 1, 1962)

By HASTIE, *Circuit Judge.*

Appellant is a federal prisoner who is serving a ten-year sentence for income tax evasion. Proceeding under Section 2255 of Title 28, United States Code, he has asked

the District Court for the District of New Jersey, where he was tried, to set aside his conviction, alleging that his trial was fundamentally unfair. The court dismissed his petition without taking testimony. The prisoner has appealed.

Appellant's first contention requires only brief discussion. He argues that his trial was unfair because the trial judge had read a presentence report, containing information prejudicial to the accused, before the case was actually tried.

The relevant facts are matters of record. The appellant originally entered a plea of guilty. Thereafter, in normal and proper course, a presentence report was prepared and presented to the judge for his use in deciding what sentence to impose. But on the day set for sentencing the accused sought permission, later granted, to withdraw his plea. Subsequently the indictment came on for trial to a jury with the same judge presiding.

The record shows that before the trial defense counsel knew the judge had received and read the presentence report. In fact, the judge spoke of having received the report in discussing with counsel the motion to withdraw the original plea of guilty. Yet, no request was made that the judge disqualify himself or assign the trial to a colleague.

More fundamentally, the mere fact that a judge knows something to the discredit of an individual does not in itself disqualify him from presiding over a trial at which a jury is to determine that person's guilt or innocence of crime. If the judge conducts the trial fairly and properly and does not communicate what he knows about the accused to the jury, there is no rational basis for a claim that the judge's knowledge of facts discreditable to the accused and not in the record has made the trial fundamentally unfair. It often occurs in cases involving recidivists, in new trials and in other situations that a judge who has derogatory information about the accused, which is not and should not

be submitted to the jury, properly presides at a jury trial.[1]

Appellant's second principal contention is that at the trial the prosecution withheld information showing that a principal government witness stood to be rewarded by the dismissal of an indictment pending against him if he testified to the satisfaction of the prosecution and, therefore, was unworthy of belief.

Here again, the trial record is decisive. The witness in question, Joseph Abrams, had been indicted along with Kravitz, but a severance had been granted and his case remained pending when appellant was tried. Appellant contends that the prosecutor led the court and jury to believe that Abrams would in fact be tried when the prosecutor, pursuant to written authorization from his administrative superiors, contemplated the dismissal of the indictment against Abrams. It is not alleged that Abrams had been promised a favorable recommendation as to dismissal of the charges against him. Apparently, the argument is that the status of the pending indictment against Abrams, as known

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1. See *United States v. Lowrey*, 3d Cir., 1949, 172 F. 2d 226, affirming per curiam on opinion of the trial court, W. D. Pa. 1948, 77 F. Supp. 301 (trial judge previously heard defendant's petition for habeas corpus, granting new trial; judge not disqualified from presiding at that new trial); *United States v. Malinsky* S. D. N. Y. 1957, 153 F. Supp. 321 (judge not disqualified by virtue of having read portions of transcript of prior mistrial held before another judge); *cf. United States v. Perlstein*, 3d Cir., 126 F. 2d 789, 806, *cert. denied*, 1942, 316 U. S. 678 (a circuit judge presided at first trial of defendant, which conviction was thereafter reversed; this does not disqualify him from sitting on appeal from second conviction); *United States v. Chrisos*, 7th Cir., 291 F. 2d 535, *cert. denied*, 1961, 368 U. S. 829 (judge presiding at Mann Act trial of panderer not disqualified merely because he had previously presided at trial at which prostitute was convicted and had thereafter read presentence report on prostitute, whose credibility was important issue in panderer's trial). But *cf. McFadden v. United States*, 7th Cir., 1933, 63 F. 2d 111 (judge disqualified from presiding at nonjury trial when he had read nonrecord information that caused him to prejudge guilt of one defendant). Compare *Smith v. United States*, 1959, 360 U. S. 1, 11, 17-18 (concurring opinion) (error for trial judge to confer with F. B. I. agent regarding prisoner's background *before* plea is entered).

to him, was such as to induce or influence him to testify against Kravitz as a means of winning favorable disposition of his own indictment. But the facts which would justify such an inference were disclosed to the jury. Abrams himself testified about the pending indictments in a way that must have made entirely clear to the jury his understanding that he might gain by testifying against Kravitz in this case. More particularly, Abrams testified that he had been indicted in the Southern and Eastern Districts of New York as well as in New Jersey. He stated that there had been a proposal that he plead guilty to the New York charges and that the charges in the District of New Jersey not be prosecuted. He then added, "it is my understanding that the Justice Department agreed to this plan and at the last minute something took place". He amplified this, saying: "I understood that the United States Attorney in Newark, Mr. Ritger, refused to go along with this plan although the Justice Department had agreed to it. . . . [H]e would not nolle pros in New Jersey—would not agree to nolle pros in Jersey until after the trial of the Kravitz case". Thus, the witness himself disclosed very clearly the basis for an argument and an inference that he had a substantial interest in and hope of winning the favor of the prosecutor by his testimony in this New Jersey case. In this connection, there is no reason to infer that the prosecutor believed or had reason to believe that Abrams was perjuring himself in his testimony against Kravitz. Thus, there was no impropriety in offering his testimony, disclosing at the same time, as the prosecutor did, the bad criminal record of the witness with its implication as to his untrustworthiness.

Finally, the trial court was careful to instruct the jury concerning the possible untrustworthiness of Abrams both as an accomplice and as one who in the words of the charge, "still has criminal and civil tax problems to face in the future". Similarly, the prosecutor himself in addressing

the jury scrupulously avoided any suggestion that Abrams was a man of good character. Rather he said:

> "Our production of Joseph Abrams doesn't mean we think he is a saint. When we put him on the witness stand we didn't put him on there with our blessings. I told you when I opened that Joseph Abrams had been convicted of embezzlement of government property and was serving time for embezzlement. I told you he had pleaded guilty to his own income tax return for having evaded taxes and was serving time for that.
>
> "He testified on the stand he was serving 30 months for embezzlement and two years for the income tax concurrently. In addition, he is on probation for income tax evasion starting when he is released from the penitentiary."

The entire record considered, we think the jury was given a fair picture of the type of person Abrams was and of his interest in winning the favor of the prosecution. Certainly, there was nothing in the prosecution's presentation or use of this witness to make it intolerable that this conviction stand.

The judgment will be affirmed.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,774.

UNITED STATES OF AMERICA

v.

HERMAN KRAVITZ,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Present: KALODNER, STALEY and HASTIE, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

June 1, 1962

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,774.

UNITED STATES OF AMERICA

v.

HERMAN KRAVITZ,
Appellant.

ORDER SUR PETITION FOR REHEARING.

Present: KALODNER, STALEY and HASTIE, *Circuit Judges.*

After due consideration the petition for rehearing in the above entitled case is hereby denied.

By THE COURT,

(Sgd.) WILLIAM H. HASTIE,
William H. Hastie,
Circuit Judge.

Dated: June 26, 1962